

# PUBLIC PROCUREMENT

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## WHITE BOOK BALANCE SCORE CARD

Recommendations:	Introduced in the WB:	Significant progress	Certain progress	No progress
Urgent adoption of the new Law, harmonized with the EU Directive 2014/24	2018			√
Expansion of the administrative and expert capacities of the Public Procurement Office and State Audit Institution to effectively oversee the planning and execution of public procurements by contracting authorities and combat corruption.	2013			√
Amending the Law in relation to the Public Procurement Office's and the Commissions' authorities in cases of suspected "bid rigging," (the ability to implement special procedures to control the implementation of awarded contracts and submit proposals for the annulment of a public procurement contract).	2014			√
Active cooperation between the PPO, the Ministry of Finance, the Ministry of Economy, the Anti-Corruption Agency, the budget inspectorate, the State Audit Institution and the Government of Serbia in the implementation of the Public Procurement Law and the Memorandum on Cooperation of 15 April 2014.	2015			√

## CURRENT SITUATION

The general impression is that the new Public Procurement Law (RS Official Gazette No 124/2012, hereinafter: the Law), which has been in application since 1 April 2013, improved the legal framework for reforms in this area. The systematic application of the new Law's favourable solutions could lead to a higher level of control of the planning and implementation of public procurements, the implementation of anti-corruption measures and the protection of the rights of stakeholders.

In August 2015 the National Assembly adopted the Amendments to Law, which have been applied since 12 August 2015. These amendments introduced changes in respect of reducing formalities and increasing the number of documents posted on the Public Procurement Portal.

Unfortunately, neither the Law of 2012, nor the amendments of 2015 improved the implementation of anti-corruption measures. There are still no clear indications that the anti-corruption measures will be implemented.

When it comes to the fulfilment of its statutory obligation to provide an opinion on the interpretation and application of the Law, envisaged under Article 136, paragraph 1, item 4 of the Law, the Public Procurement Office (PPO) has been seemingly inert and inefficient in 2018. There have been cases where the PPO failed to issue an opinion on the

interpretation and application of regulations requested by interested legal entities, which contributes to legal uncertainty in this area.

According to the report of the PPO for 2018, the share of public procurements conducted in an open procedure is nearly identical to that of the previous year – 91%. The share of negotiated procurements, without invitation to bid, in the structure of public procurement value amounted to 3% in 2018, i.e. remained the same as in the previous year. The average number of bids submitted in a public procurement procedure is 2.5, the lowest so far.

## POSITIVE DEVELOPMENTS

In 2018, the PPO adopted model tender documents for the procurement of motor vehicle servicing and maintenance services and the procurement of insurance services for property, persons and vehicles. In addition to a model of tender documentation, the PPO has also issued certain analytical documents aimed at improving the quality of the preparation and implementation of public procurement plans, such as analysis and recommendations for the further improvement of competitiveness, market research methodology, methodology for determining the estimated value of public procurement, analysis and recommendations for improving the monitoring function of the PPO, guidelines for the calculation of life cycle costs.

## REMAINING ISSUES

In the previous year, no progress was made in the field of fight against corruption in public procurement or in the sanctioning of criminal offences in the field of public procurement. There is no evidence of the implementation of the numerous information-sharing agreements concluded between anti-corruption state bodies, with the aim of prosecuting the perpetrators in cases of corruption, bid rigging, restrictive agreements and unusually low bids.

A remaining issue is the application of the rules on an “unusually low bid.” The official position of the Commission for the Protection of Rights in Public Procurement Procedures is that the contracting authority has the discretionary right to assess whether a bid is unusually low, i.e. whether a bid differs from the comparable market prices and raises doubts as to the ability of the bidder to execute the procurement in accordance with the offered terms. The lack of clear criteria that would oblige the contracting authority to demand a detailed explanation of all the elements of the bid brings uncertainty in public procurement procedures. Bidders who suspect that a contract has been awarded to an unusually low bid have an opportunity to protect their rights before the Commission, however, the Commission has regularly refused such requests so far.

The mechanisms for the enforcement of the Law in cases when the public procurement eligibility criteria in a particular procedure are changed with respect to the previous year’s criteria are also at issue. This particularly relates to the amendment of criteria with respect to financial indicators in cases of awarding framework agreements of significant importance for the state. In this particular case, filing a request for the protection of rights due to the criteria set in the tender documentation is not an efficient legal remedy.

In 2018, there was a reduced share of exemptions from the application of the Law on exemption grounds under Article 7, paragraph 1, items 2) and 2a) of the Law, i.e., in the case of procurements paid for with foreign loans received from international organizations and international financial institutions, or under international agreements. The share was 10% in 2018 in comparison to 27% in 2017. Intergovernmental agreements with third countries continue to violate

the principle of equal treatment of bidders, the prohibition of discrimination, transparency and the protection of competition. Also, the implementation of these agreements is often inconsistent with the adopted solutions in both domestic and EU law.

The monitoring of the execution of contracts awarded in public procurement procedures is completely neglected. The Foreign Investors Council is not aware of any cases where the Commission has exercised the power envisaged in Article 163 of the Law, to file a lawsuit for the annulment of the contract on grounds set forth in this article.

Bearing in mind the limited capacities of the PPO, it is questionable whether it will be able to control public procurement plans and amendments to such plans. In accordance with the Law, the contracting authority may initiate a public procurement procedure if procurement is foreseen in the annual plan of public procurement. However, amendments to the Law introduce a novelty that allows the possibility of misuse, in the event that exceptional cases where public procurement cannot be planned in advance or for urgent reasons, the contracting authority may initiate the public procurement procedure and if the procurement is not foreseen in the public procurement plan.

At the end of September 2019, the Government of the Republic of Serbia adopted the Proposal of the Law on Public Procurement, which is a significant step forward in harmonization of domestic legislation with the acquis i.e. EU Directive 2014/24. The new law is expected to simplify public procurement procedures, reduce administrative burdens, especially participation costs for SMEs. Also, new procedure is being introduced - the Innovation Partnership, this is to enable the development of innovative goods while, on the other hand, the qualification and low value procurement procedures are abolished. Finally, the Proposal of the Law proposes a rule that all communication and exchange of data in the public procurement process will be conducted by electronic means with the Public Procurement Portal. The Proposal of the Law on Public Procurement is currently in parliamentary procedure and by the time the White Book was published, it was not adopted. FIC will make final estimation on the new Law on Public Procurement in the next edition of the White Book.

### FIC RECOMMENDATIONS

- Active cooperation between the PPO, the Ministry of Finance, the Ministry of Economy, the Anti-Corruption Agency, the budget inspectorate, the State Audit Institution and the Government of Serbia in the implementation of the Public Procurement Law and the Memorandum on Cooperation of 15 April 2014.
- Expansion of the administrative and expert capacities of the Public Procurement Office and State Audit Institution to effectively oversee the planning and execution of public procurements by contracting authorities and combat corruption.
- Strengthening the Law in relation to the Public Procurement Office's and the Commissions' authorities in cases of suspected "bid rigging," (the ability to implement special procedures to control the implementation of awarded contracts and submit proposals for the annulment of a public procurement contract).